CENTURY MINING LTD.

v.

LOO KEE TRADING CO. & ANOR.

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL SUIT NO. 131 OF 1977]
SEPTEMBER 1981

TORT: *Claim for loss arising (a) from breach of duty as a common carrier of goods - Whether defendant a common carrier - Test to be applied; (b) from breach of duty of care as a private carrier - Whether defendant liable in negligence.*

The plaintiffs mined for tin ore at their tin mines at Gambang, Pahang. The 2nd defendant was a holder of a carrier's licence in respect of a motor lorry but the 1st defendant claimed that the lorry belonged to him and that he used it under cover of the 2nd defendants' carrier's licence and also used it for the carriage of goods for ore in connection with his other business, as a dealer in timber. It was accepted by the plaintiffs that the 1st defendant operated independently of the 2nd defendant.

The plaintiffs contended that the 1st defendant was a common carrier of goods and in that capacity was on or about 29 August 1974, entrusted by the plaintiffs with 55 bags of tin ore weighing 36.73 piculs to be conveyed and delivered to the Straits Trading Co. Ltd. at Kuala Lumpur, that the tin ore was not so delivered or at all and that thereby the plaintiffs have suffered a loss in the sum of RM25,000 (being the value of the tin ore in August 1974) for which amount he is liable to the plaintiffs.

They further contend that even if the 1st defendant was a private carrier he was liable in damages to the plaintiffs on the ground that it was his negligence that resulted in the non-delivery of the tin ore resulting in damage to the plaintiffs. The acts constituting negligence relied on were set out in the particulars of negligence that is:

(a) Failing to report at the Balai Polis, Gambang, before leaving Gambang for Kuala Lumpur, the time of departure and quantity of tin ore being carried as required under 'Operation Unong Bukit';

(b) Failing to deliver the said goods safely and securely;

(c) The plaintiffs will also rely upon the doctrine of *res ipsa loquitor*.

The defence was:

(a) that at all relevant times the 1st defendant was a private carrier of goods;

(b) that the tin ore was stolen by robbers and through no fault or neglect on the part of the defendants and;

(c) that in any event there was a contract in writing in respect of the terms on which the tin ore was carried, one of which excluded liability for loss of the goods in transit as a result of robbery.

Held:

[1] As a question of fact that in undertaking the carriage of tin ore on 29 August, the 1st defendant functioned as a private carrier and not as a common carrier.

A common carrier is absolutely responsible at common law for the safety of goods entrusted to him for carriage except where loss or damage results from an act of God or an act of the King's enemies, the fault of the consignor or inherent vice of the goods themselves. The failure to deliver safely is a breach of duty independent of any contract of carriage. The real test of whether a person is a common carrier or not is whether he holds out, expressly or impliedly, that he will carry for hire so long as he has room, the goods of all persons who wish to have their goods delivered by him. Courts tend to restrict rather than extend the class of common carriers. A person is not a common carrier if he reserves to himself the right of accepting or rejecting offers of goods for carriage, being guided solely by the attractiveness or otherwise of the offers rather than by the availability of room. The 1st defendant was free to accept or refuse a consignment. There was no evidence that the 1st defendant held himself out as a common carrier.

[2] There was no undertaking of any kind between the parties that the 1st defendant was to be exempted from liability for loss and a result of robbery.

[3] The tin ore was stolen by robbers through no fault or neglect on the part of the 1st defendant.

A private carrier of goods or of passengers is under a duty to exercise reasonable care in his carriage as bailee. He is liable for damages, loss or delay resulting from negligence or from intentional acts inconsistent with the owner's rights in the goods. The loss, damage or non-delivery is *prima facie* evidence of negligence.

It is not sufficient to prove carelessness on the part of the defendant. A causal connection between the defendant's carelessness and the damage must also be proved. Therefore, whether there was a practice to inform the Gambang police of an intended departure with a consignment of the tin, and whether the plaintiffs had required the 1st defendant to inform the police, had no bearing on the loss of the tin ore. The plaintiffs should have established a causal connection between the non-reporting to the Gambang police of the 1st defendant's departure of Kuala Lumpur and the loss of the consignment of tin ore but did not. The hijacking had taken place at about 36 miles from Kuantan. Even if the Gambang police had been informed, the earliest the Karak police would have been alerted to the possibility of there having been a robbery of the tin ore would have been not less than two hours after the robbery and any steps taken by the police would not have resulted in the recovery of the stolen lorry and tin ore.

[The claim was dismissed with costs.]

For the plaintiffs - S. Sivasubramanian
For the defendants - Joseph Au

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Also found at [1982] CLJ 33